

No. 14405

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Appellant

vs.

ROBERT H. H. SUGDEN AND
JEAN S. SUGDEN *Appellees*

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court,
District of Arizona

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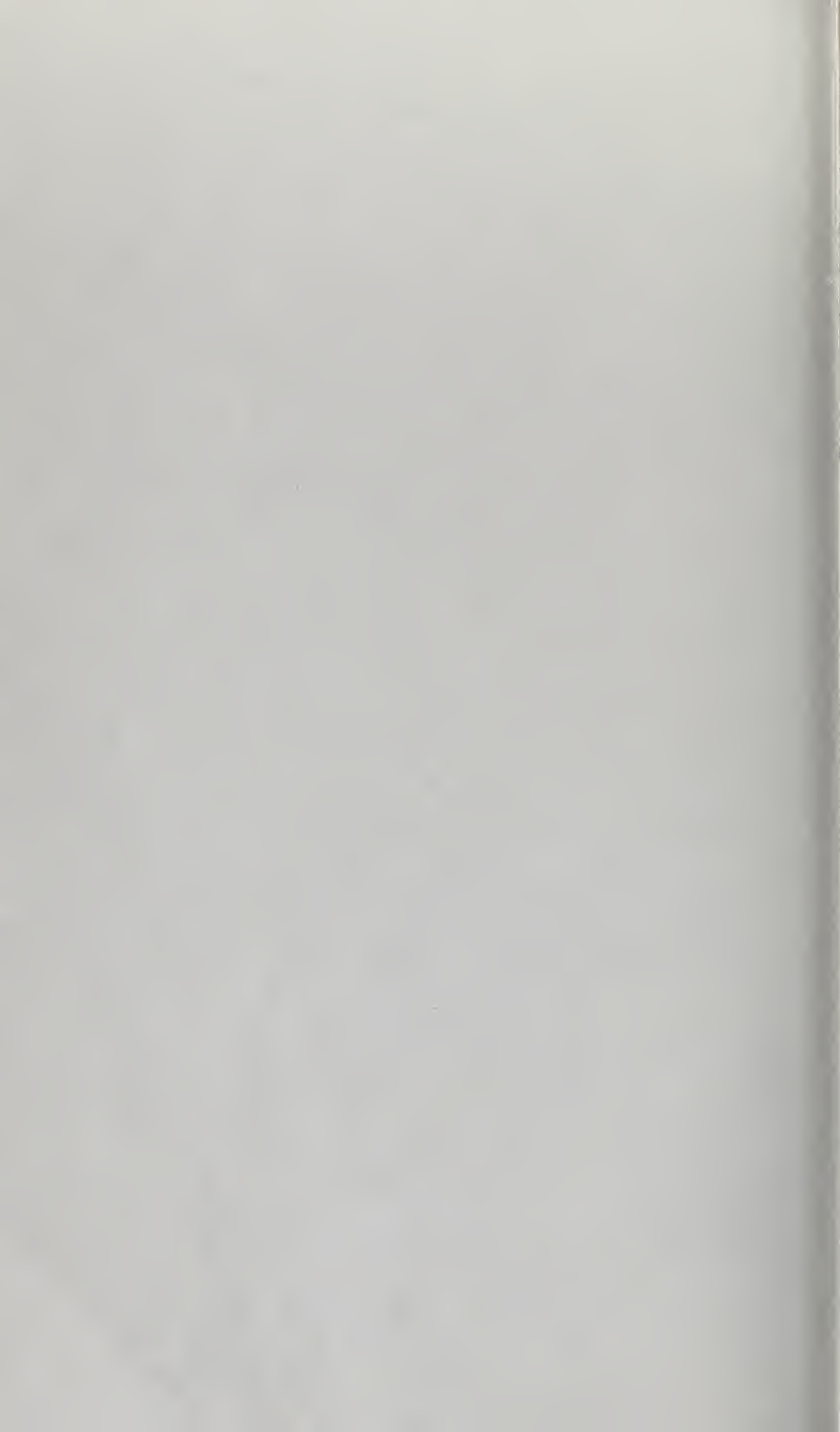


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JURISTICTIONAL MATTERS

The defendants, Robert V. H. Sugden and Jean S. Sugden, husband and wife, were indicted on a charge of violating 18 U.S.C. 371 (conspiracy); and the defendant, Robert V. H. Sugden was also indicted on a charge of violating 8 U.S.C. 1324(a)(3) (concealing aliens illegally within the United States). The United States District Court for the District of Arizona had jurisdiction by virtue of 18 U.S.C. 3231 and that Court had venue under Rule 18, Federal Criminal Rules, due to the fact that the acts stated in the indictments are alleged to have occurred with the District of Arizona.

This Court has jurisdiction under the provisions of 28 U.S.C. 41, 1291, and 1294 and under 18 U.S.C. 3737 because this is an appeal from a final decision by the

District Court dismissing the indictments in these cases and no direct review by the Supreme Court is authorized under 18 U.S. 3731.

These two cases have been ordered consolidated by this Court for purposes of this appeal because the issues are common to both cases (T.R. 84).

STATEMENT OF FACTS

The defendants entered pleas of not guilty to the indictments, and the cases (C-11,554 and C-11,555) were consolidated for trial (T.R. 15). Prior to the trial of the cases, defendants moved to suppress Government evidence obtained through radio monitoring (T.R. 10-13). The District Court ordered a preliminary hearing on the Defendants' Motion to Suppress Evidence.

At the preliminary hearing the evidence offered showed that Robert J. Stratton, an Assistant Engineer with the Federal Communications Commission, on orders from the Washington Office made an investigation of a suspected illegal use of radio in the vicinity of Yuma, Arizona (T.R. 34). On the 4th, 9th, 10th and 18th of September, 1953, Mr. Stratton monitored the radio messages from the defendants' radio station (T.R. 35-37), and the suspicion of an illegal use of the radio was confirmed (T.R. 39). The defendants were not advised that their radio messages were being monitored, nor was any attempt made to secure their consent for such monitoring (T.R. 36). Transcripts were made of the monitored messages, and these transcripts were sent to Washington (T.R. 38). Copies of the transcripts were made available to the United States Immigration Service. Mr. Stratton acknowledged that he had testified before the Grand Jury which indicted the defendants concerning the substance of conversations monitored by him (T.R. 41), and that he had conversations with the United States Attorney concerning the

testimony which he would give at the trial. Counsel for the Government stated that they would rely on Strat-to's testimony in a trial of the indictments.

Horace Billingsley, Lawrence Thomas Gerhart, and Robert F. Sommers, former employees of the defendants testified that they had been questioned by the United States Attorney or Immigration Agents, and that transcriptions of radio broadcasts involving defendants were used in the questioning. Both Gerhart and Sommers testified before the Grand Jury concerning the suspected activities of the defendants.

Robert and Jean Sugden both testified that they placed their reliance on a representative of Motorola Co. in matters concerning radio licensing and they were not told that they could not use the radio. Robert Sugden identified Exhibit 3 as his station license, which was issued to him to operate a radio station for farming purposes. Both defendants stated that they had received their operators' licenses on September 17, 1953, and both identified their operators' licenses (T.R. 66 and 73, Exhibits 1 and 2).

Theodore Kieling, a radio technician in Yuma, Arizona then testified that he checked the defendants' radio and warned them against using the radio without an operator's license, and he even gave them forms to fill out for their operators' licenses.

The District Court held that the interception by the Government of the radio messages of defendants was unlawful, and the Court ruled that all testimony or information gained from that source should be suppressed (T.R. 79). The Court, on motion of defendants, dismissed the indictments (T.R. 80). On May 5, 1954 the Court signed and filed a formal written order suppressing evidence which the Government gained from monitoring the broadcasts of the defendants, and dis-

missing the indictments on the grounds that the indictments were obtained by the Grand Jury's use and consideration of illegally obtained information and evidence, and the further grounds that the Government must use illegally obtained evidence to establish its case against the defendants (T.R. 22-25).

SPECIFICATION OF ERRORS

The appellant relies upon the following errors as a basis for this appeal:

1. The District Court erred in ruling as unlawful the interception of the defendants' radio messages by an engineer of the Federal Communications Commission acting for the United States Government (T.R. 79).

2. The District Court erred in ruling that evidence obtained through monitoring of the defendants' radio messages by the United States should be suppressed (T.R. 25 and 79).

3. The District Court erred in dismissing the indictments against the defendants (T.R. and 80).

SUMMARY

The issues presented in this appeal are of vital importance to the future successful operations of the Federal Communications Commission in its control of radio broadcasting, and the decision of this Court on the issues presented will materially affect future federal law enforcement. The contentions which the Government presses in this appeal are basically these: that the Federal Communications Commission, through its agents, has the power and authority by law to monitor the radio broadcasts of private citizens; that information gained through the Federal Communications Commission monitoring may be used either by the Federal

Communications Commission investigating and prosecuting a violation of the Communications Act, or by any other Federal Agency in a criminal investigation within its jurisdiction; and lastly, that the protections provided by the Communications Act are not available to an individual who broadcasts in violation of the provisions of the Act.

ARGUMENT

The defendants by their motion to suppress evidence (T.R. 10-12) argued that the interception of their radio broadcasts by the Government constituted an unlawful search and seizure in violation of the protections of the Fourth Amendment to the Federal Constitution, and such interception also constituted a violation of Section 605 of Title 47 (The Federal Communications Act of 1934).

The Government believes that it is well established that the interception of conversations whether by wire or air is not a violation of the Fourth Amendment. This Court in the famous case of *Olmstead vs. U. S.*, 19 F. 2d.843; affirmed 277 U.S. 438, held that the tapping of defendant's telephone wires was not a violation of his constitutional rights. The Supreme Court in affirming this Court in the *Olmstead* case held that the tapping of telephone wires was not a search nor seizure, but a mere use of the sense of hearing.

In *Goldman vs. U. S.*, 316 U. S. 129, the Supreme Court reaffirmed and adheared to the principles stated in the *Olmstead* case concerning the Fourth Amendment.

It is therefore the contention of the Government in this case that no constitutional protection of the defendants was invaded. What was done in this case cannot be distinguished from what was done in the *Olmstead* case or the *Goldman* case. Here there is no showing of an invasion of the defendants' dwelling or office, nor is

there any seizure by the Government of the defendants' property. There was merely a listening or overhearing of the defendants' voices, as they were projected through the air which, as the cited cases hold, is neither a search nor a seizure.

The Government believes, however, that the main contention of the defendants is that they are entitled to the protection of Section 605 of Title 47, and that Federal agents violated Section 605 by monitoring the radio broadcasts of the defendants; hence, all evidence and information so gained must be suppressed, and the Government forbidden to make use of such information in a criminal trial against the defendants.

Section 605 states in part:

“ and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person;”

In support of their contention that Section 605 forbids the use of monitored radio information the defendants cited to the learned Trial Judge the following Supreme Court cases:

Nardone vs. United States, 302 U. S. 379

Weiss vs. United States, 308 U. S. 321

Nardone vs. United States, 308 U. S. 338

Goldstein vs. United States, 316 U. S. 114

All of the above cited cases dealt with the problem of tapping telephone wires by Federal Agents to gain evidence for a criminal case. The first *Nardone* case held that Section 605 forbade wire tapping by all persons including Federal Agents and that evidence obtained by Federal Agents by tapping telephone wires was not admissible in Federal Court. The *Weiss* case

and the second *Nardone* case reaffirmed the position of the court that wire tapped evidence was not admissible in a Federal Court against the sender, and the Supreme Court further held that the Government could not make use of such information gained by wire tapping in order to establish a case against the sender. The last important case on the subject, *Goldstein vs. United States*, *supra*, held that the use of wire tapped information to induce a party to testify in a criminal case would not render such testimony so procured inadmissible against a defendant not a party to the message.

In the case at issue the defendants argued before the trial court that their situation is directly in point with the wire tapping cases cited above due to the fact that Section 605 applied to both radio and telephone. The evidence offered by defendants shows that their radio conversations were listened to and that use of such conversations was made in questioning witnesses, presenting the case to the Grand Jury, and preparing for trial.

Notwithstanding the seeming similarity in facts between the wire tapping cases and the case at issue, the Government contends that there are certain distinguishing features in this case which were not present in the cited cases. First, the medium used by the defendants is different than that used in the cited cases, for in the present case the defendants made use of radio broadcasting which is a strictly regulated medium requiring licensing and specific fields of use; whereas the medium of telephonic communication in the cited cases is public in character with little or no regulation on the sender. Second, the Federal Agents who made the interceptions of radio messages in this case are agents of the Federal Communications Commission, an agency of the United States, which the Government contends has authority to intercept radio

messages and make use of information gained therefrom. Lastly, the defendants in their operations were violating the provisions of the Communications Act, the very Act under which they seek protection.

In order to properly decide the issues in this case certain sections of the Communications Act must be called to the Court's attention. While the defendants may claim the protection of Section 605, it must be remembered that that section is but a part of the entire Act, and for a proper construction of the part, the whole must be considered.

United States vs. Alpers, 338 U. S. 680, 684

Adler vs. Northern Hotel C., 175 F 2d 619, 621

Elizabeth Arden Sales Corp. vs. Gus Blass Co. 150 F. 2d. 988, 993

Marshal vs. Andrew F. Mahoney Co., C.C.A. 9, 1932 56 F. 2d. 74, 78

The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio, and in the new Act Congress created the Federal Communications Commission to which it entrusted authority previously exercised by several other agencies. *Scripps-Howard Radio, Inc. vs. Federal Communications Commission*, 316 U. S. 4. It is noteworthy that among the articles of equipment which Congress directed to be turned over to the new agency, the Federal Communications Commission, was all equipment including monitoring radio stations of the Federal Radio Commission. 48 Stat. 1102, 47 U.S.C. 603(b)(1). This section standing alone would have little force, but Congress also gave the Federal Communications Commission the power to make such expenditures from appropriations for obtaining land, for constructing, and for maintaining such radio monitoring stations, as may

be necessary for the execution of the functions vested in the Commission. 47 U.S.C. 154(g).

It is the contention of the Government that these cited sections of the statute would be sufficient to establish the authority of the Federal Communications Commission to monitor radio broadcasts of private individuals and to make use of the information gained from such monitoring.

The Supreme Court gives support to the view that the Federal Communications Commission must be able to listen to radio broadcasts and make use of the information it gains therefrom when the Court in *National Broadcasting Co. vs. United States*, 319 U. S. 190 at 215, stated:

“The Act itself establishes that the Commission’s powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.”

Section 303 of Title 47 setting forth the powers and duties of the Commission adds further weight to the position that Congress intended that the Commission should monitor radio broadcasting and make use of such information. Of particular importance is subsection (n) of Section 303 in which it is stated that the Commission shall:

“Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.”

But, as the defendants argued in the District Court, conceding that the Commission may monitor radio broadcasts, the sole use which may be made of such information is in matters directly within the jurisdiction of the Commission; the Commission may not turn over such information as it gained by monitoring to any other Federal Agency for use by that agency. The defendants argued that the protection of Section 605 would be destroyed if the Commission can lend its information to other agencies. Before answering the contentions of the defendants, the Government believes that it is well to point out the extremes which may occur under the defendants' position. If the argument of defendants is followed we may have this situation: A foreign agent residing within the United States makes use of a short wave radio to send secret defense information of the United States to his foreign government; the Federal Communications Commission discovers this plot by listening to the broadcasts. According to defendants such an individual could be prosecuted for broadcasting without a license or some other related violation of the Communications Act, but the information gained by the Federal Communications Commission could not be used by the Justice Department in a prosecution for espionage. The Government believes that Congress in-

tended no such result when it enacted the Communications Act.

It is true that Section 605 sets up a broad protection for those who make use of wire and radio communication, but the purpose of that section is to protect the means of communication and not the secrecy of the conversation. *Goldman vs. United States, supra*, at page 133.

To promote the purposes of the Communications Act Congress created the Federal Communications Commission. To that body Congress gave broad powers which included not only powers exercised by previous agencies but also additional power over wire and radio communications. 47 U.S.C. 151. In Section 303(n) of the Act Congress gave the Commission the authority to inspect radio installations to ascertain whether in construction, installation, and operation they conform not only to the rules and regulations of the Commission, but whether they also conform to the provisions of any Act. It is the position of the Government in this appeal that such a delegation of power to the Commission also gives that agency the power by implication to make available to another Federal Agency information which the Commission has secured through an inspection carried on by monitoring the operation of a radio station. This position is based on the proposition that a statutory grant of power carries with it, by implication, everything necessary to carry out that power and make it effectual and complete. *United States vs. Jones*, 204 F. 2d. 745 at 754 C.C.A. 7 (1953). If the argument offered by the defendants were adopted the Commission would be in the absurd position of being able to discover violations of Acts other than the Communications Act but not being able to divulge the information to the proper Federal Agency. Such an absurd position was not intended by Congress, nor will this Court place such

a construction on the Act when a reasonable interpretation will not do violence to the language of the Act and will effectuate the intent of Congress.

United States vs. Raynor, 302 U. S. 540, at 547

Haff vs. Yung Poy, C.C.A. 9, 1933, 68 F. 2d. 203 at 205.

Chester N. Weaver Co. vs. Commissioner of Internal Revenue, C.C.A. 9, 1938, 97 F. 2d. 31 at 33

The Government contends that the protections set forth in Section 605 are not destroyed by the construction which is placed on the sections outlined heretofore. Section 605 protects an individual in the authorized use of radio communication, but the Federal Communications Commission has the duty of protecting the public's interest in radio communication. A harmonious construction of the entire Act would establish Section 605 as protecting the sender of a radio message from unauthorized interception and divulgence of the radio message, but all *radio* communications would be subject to the power of the Commission to monitor broadcasts for the protection of the national defense and welfare, and the Commission would have the power to make use of the monitored radio information itself or turn it over to another Federal Agency for its use. This construction gives full effect and meaning to the whole Act.

There remains one last point to be considered in the defendants' claim of protection under Section 605. Does the protection of Section 605 cover the defendants when they were unlicensed operators and using radio broadcasting for an illegal purpose? It is the Government's contention that the answer to the question must be, No.

Section 301 of the Act provides, in part, that no person shall use or operate any apparatus for the transmission of signals by radio within any state when the effect

of such use extends beyond the borders of said state, except in accordance with the Act and with a license in that behalf issued under the Act. Section 309(d) of the Act provides, in part, that a station license shall be subject to the terms designated in the license and operated in the manner authorized in the license. By the provision of Section 318 of the Act, an operator's license is required for the operation of radio apparatus licensed under the Act.

The defendants secured a radio station license (Ex. 3) providing for the use of radios on their farm vehicles to assist in their farming operations (TR 67 and Ex. 3). The station license was issued August 27, 1953 (Ex. 3), but the defendants did not receive their operators licenses until September 17, 1953 (TR 47, 68, 74, and Exs. 1 and 2). In the period from August 27 to September 17 the defendants operated the station even though they had no license. Of more consequence is the fact that the station was used for an illegal purpose, namely, to warn field foreman of the approach of immigration officers so that illegal immigrants could be hidden from detection.

The defendants now claim that the Communications Act, which they flagrantly violated, protects them in their illegal use of their radio. The Government contends that Congress intended no such illogical position. Before the defendants can claim the rights given by the statute, they must perform the duties required by that statute. This they failed to do.

This Court, in *Casey vs. United States*, C.C.A.9, 191 F. 2d 1, reversed on other grounds 343 U. S. 808, held that Section 605 refers to communications over licensed facilities. In the *Casey* case, this Court stated at page 4:

“There is no merit to appellants' contention that the trial court erred in admitting in evidence the substance of radio messages between appellants.

§605 of the Act, 47 U.S.C.A. 605, which prohibits the interception and divulgence of communications without the consent or approval of the sender, refers to communications over licensed facilities. The appellants were unlicensed operators transmitting voice messages over an unlicensed station, without call letters, on a portion of the band reserved for Morse Code operations. The protections of the Act were never intended for, nor do they cover, such communications which are themselves illegal.”

It is the position of the Government that the reasoning of this Court in the *Casey* case was sound. Good sense and logic support this position that licensed facilities are the object of the Act's protection. To adopt a different view would place Congress in the position of establishing a policy throughout a statute and then in one section provide for the obstruction of that policy. No court will approve such a construction when a sensible reading of the entire act shows the true intent of the lawmakers.

United States v. Raynor, supra.

Haff v. Yung Poy, supra.

Chester N. Weaver Co. v. Commissioner of Internal Rev., supra.

Ford Motor Co. v. Mahone, 205 F 2d 267, 272.

Burcham v. J. P. Stevens & Co., 209 F 2d 35, 40.

Swan Island Club v. Yarbrough, 209 F 2d 698, 701

CONCLUSION

The Government respectfully submits that the District Court erred: (1) in holding that the evidence which the Government gained by monitor was illegally obtained; (2) in ordering the monitored radio information suppressed; and (3) in ordering the indictments against defendants dismissed. The judgment and ruling of the District Court should be reversed, with appropriate instructions directing a trial on the merits.

Respectfully submitted,

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